

### Project Hosts Section of Litigation Death Penalty Program

On January 10, 2009 at the ABA Section of Litigation Winter Leadership Meeting in Scottsdale, Arizona, the Project hosted "The ABA's Role in Changing Capital Representation." Over 200 people heard featured speakers including former Louisiana Death Row prisoner Wilbert Rideau, volunteer attorney Larry A. Hammond of Osborn Maledon P.A., and Arizona Supreme Court Justice W. Scott Bales.

The participants were welcomed by ABA President H. Thomas Wells, Jr., whose law firm Maynard Cooper & Gale, PC, provides local counsel to volunteer law firms working on death penalty cases in Alabama. Justice Bales opened the

program with a discussion of the ABA's involvement in reforming Arizona capital representation through the adoption by court rule of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. He encouraged the continued assistance of the ABA. Mr. Hammond then spoke movingly about the resource problem for state Death Row appeals and the difference that volunteer death penalty attorneys have made for Arizona prisoners.

Finally, Mr. Rideau told his compelling story of the racism he faced when he was convicted of murder and sentenced to death in 1961 at the age of 19, after

***"I have been to many Section of Litigation programs over the years, but I have never seen a room of 225 people as intensely riveted on a speaker as they were during Wilbert Rideau's presentation. It was stunning, with the silence broken only by an occasional snuffle, and hardly a dry eye in the house. Wilbert's comments drove home to all of us, in palpable terms, the critical importance of competent representation as an indispensable element of a fair trial."***

~ABA Section of Litigation Chair & Volunteer Attorney  
Robert L. Rothman, Arnall Golden Gregory LLP

being represented by two real estate attorneys. After 44 years in prison, he was finally set free in 2001 through the assistance of volunteer attorneys. He now works with Death Row prisoners around the country and is finishing a book that will be published in the coming months.

Special thanks to the Section of Litigation and

Chair Robert Rothman for the opportunity to thank our volunteers for their support. A presentation highlighting the Section's work and the continuing need for volunteer assistance can be viewed here:

[www.abanet.org/deathpenalty/participatingfirms/Presentation/index.html](http://www.abanet.org/deathpenalty/participatingfirms/Presentation/index.html).

### Director's Report: A Life-Saving Investment

Few of us have escaped the impact of today's economic reality. We all know friends who have lost jobs, budgets that have been cut, and organizations that have been forced to close. No industry or profession has gone untouched, and we, too, are feeling the impact. Civil law firms have always been the backbone of our work, providing critical legal representation to Death Row prisoners without counsel and infusing the

defender system with badly needed resources. But many firms are now reluctant to take responsibility for pro bono death penalty cases because of the out-of-pocket expense of handling a case. Law firm lawyers now have the *time* to handle a death penalty case but want to avoid making a financial commitment. Unfortunately it takes money and skills to competently represent a Death Row prisoner. What many firms do not realize is that they can do

this work cost-efficiently and effectively. Firms that work closely with our staff and the defender community will be able to focus on critical issues, avoid unnecessary research and duplication of efforts, and utilize the terrific work that has been done in other cases. Our advice helps firms provide meaningful training opportunities for colleagues, and handling a case often creates a sense of camaraderie in law firms that is particularly helpful in these stressful times. We work with law firms to identify the

categories of costs and experts that will be required so that a reasonable budget can be developed. There will still be costs, some of which will be unexpected as the investigation of the case unfolds, but we can help firms avoid unnecessary expenditures. Finally, we can direct interested law firms to other kinds of death penalty projects, some of which require a more discrete investment of time and money.

***(continued on page 3)***



### Save the Date in Boston

On June 25, 2009, from 3:00-6:00 PM, the Project will host an informational session at the John Joseph Moakley U.S. Courthouse in Boston, MA. This two-part program will provide basic legal training and discuss the need for assistance and the costs and benefits of handling a pro bono death penalty case. A complimentary reception will follow.

### Upcoming Trainings

National Defender Investigator Association  
2009 Conference  
Dayton Beach, FL  
April 2-3

The Fight for Life  
Capital Defense Training  
Murfreesboro, TN  
April 3-4

Capital Trial Voir Dire  
Plano, TX  
April 15-17

National Seminar on the  
Development and  
Integration of Mitigation  
Evidence in Capital Cases  
Philadelphia, PA  
April 16-19

Annual Capital  
Defense Seminar  
Harrisburg, PA  
April 23

2009 Clarence Darrow  
Death Penalty Defense  
College  
Chicago, IL  
June 1-5

## Impact of the Recession on Indigent Capital Defense

The global economic crisis is having a significant impact on the available funding for indigent capital defense across the U.S. Many states have imposed across-the-board reductions for staff and funding in all state offices, which have particularly severe effects on indigent defense services because of their existing tight budgets. The current fiscal emergencies have, without a doubt, created crises for indigent capital defense in almost every death penalty jurisdiction.

The recession has also focused additional attention on the overall costs of death penalty cases. In the past year, a study from California

concluded that each death penalty trial costs \$1.1 million more than a non-death penalty case. Likewise, a study from Maryland found that death penalty trials are nearly \$2 million more costly than similar cases where the death penalty is not sought. These studies are consistent with previous reports evaluating the costs of the death penalty.

On March 18, 2009, New Mexico repealed the death penalty, in part because of cost. Lawmakers in several other states, including Colorado, Kansas, Louisiana, Maryland, Montana, Nebraska, New Hampshire, and Washington, have examined the costs of the death penalty and

alternatives in connection with efforts to limit the use of the death penalty or replace it with life without the possibility of parole. The Project's insistence on the funding necessary for high quality legal representation for defendants in death penalty cases does not vary with changes in the economic situation.

We are currently responding to the funding crises by assisting defense counsel who are initiating legal challenges to restrictions upon available funds. The Project will continue to recruit outstanding pro bono counsel to provide assistance to Death Row prisoners.

## Jurisdiction in Need: Alabama

Based on recently released data, Alabama sentenced more people to death per capita in 2006 than any other state in the country. But Alabama has yet to adopt a statewide public defender office or to implement close oversight of indigent legal services.

Despite regular efforts in the legislature, Alabama's failure to implement necessary reforms has helped to propagate a system that the ABA has found does not provide uniform, quality representation to the majority of indigent defendants and one that weighs particularly heavily on capital defendants. However, the state's most

significant obstacles occur after trial. Alabama is one of a few states in the nation that does not provide indigent capital inmates counsel during state post-conviction proceedings, leaving impoverished Death Row prisoners to find their own attorneys during the appeal process.

In addition to an unprecedented number of prisoners who need post-conviction counsel in Alabama this year, the Alabama Supreme Court has already set five execution dates for 2009 and will likely set more. The numbers have not been this high since 1949. Serious problems with indigent defense at the trial

level, combined with judicial override of life verdicts and an increasingly politicized elected judiciary, have made the political and legal environment very challenging. According to the Equal Justice Initiative, in the next six months there are eighteen people on Death Row facing post-conviction filing deadlines who have no lawyers, no right to counsel, and will forfeit all appeal rights without volunteer legal assistance.

The Project is currently seeking volunteer counsel for several cases in Alabama. Please contact us at (202) 662-1738 for more information on how you can help.

## Firm Spotlight: Manatt, Phelps & Phillips LLP

Albert Carreon, an Arizona Death Row prisoner, was convicted on February 25, 2005. At his trial, his counsel failed to present any significant mitigation evidence during the penalty phase of the trial. Appointed state post-conviction counsel was determined to be medically incompetent and removed from the case.

At the ABA's request, Manatt, Phelps & Phillips LLP stepped in as pro bono counsel for Mr. Carreon. Manatt employed a competent mitigation specialist who began the mitigation investigation that should have started shortly after Mr. Carreon's arrest. In March 2008, Manatt partner David Elson (pictured top right), along with associates David

Moran and Joanna Hooper, filed an application for leave to file a supplemental petition supported by a preliminary showing that significant mitigation evidence had been available if trial counsel had conducted a proper mitigation investigation.

On August 1, 2008, the trial court granted Manatt's application, ruling that Mr. Carreon has a Constitutional right, as well as an independent right under Arizona law, to the effective assistance of counsel in post-conviction proceedings. The trial court's rulings are the first by an Arizona court to address this important issue. Manatt then successfully sought the appointment of a Mexican mitigation specialist (Mr.

Carreon was raised in Mexico until the age of 13), as well as the appointment of an investigator and several experts whose fees and expenses, to a significant extent, are now being reimbursed by the State pursuant to the court's ruling.

Manatt has also worked closely with Arizona Federal Public Defender Capital Habeas Unit attorneys Dale Baich and Jennifer Garcia, as well as Mexican Capital Legal Assistance Program (MCLAP) attorneys Chris Dupont and Greg Kuykendall. Manatt volunteered to act as pro bono counsel without



expecting reimbursement for any of its out-of-pocket expenses. It has delivered zealous, high quality representation to Mr. Carreon for the very first time since his arrest. The firm hopes that the rulings for state funding of expenses will encourage other law firms to provide volunteer legal assistance to Death Row prisoners.

## Case in Need: Clemency Counsel for Federal Death Row Prisoner

According to the Death Penalty Information Center, 245 Death Row inmates have been granted clemency since 1976 for humanitarian reasons, which include doubts about the defendant's guilt or questions about the fairness of the death penalty process. Clemency, which varies from state to state, also differs for Federal Death Row prisoners, who may only be pardoned by the President. As the nation's Federal Death Row has expanded, the need for volunteer counsel has also increased. The Project is currently seeking clemency counsel

for a prisoner on Federal Death Row in Indiana. The client was convicted of murder and sentenced to death in Texas in 1995. His petition for post-conviction relief was denied.

The clemency arguments will draw attention to important mitigating evidence, such as the client's neuropsychological deficits and his history of growing up in a violent home atmosphere. Arguments should also emphasize the positive aspects of the client's character, as well as his excellent conduct in prison. While the client currently

***"We all know that whatever we might think of the death penalty, it's shameful to have a badly built system that depends on volunteer lawyers to correct miscarriages of justice. But until we can fix that wider problem, it falls to all lawyers—and certainly the best and the best-off—to help fill the gap."***  
 ~IN HOUSE at *The American Lawyer* by Aric Press, Editor-in-Chief of *The American Lawyer* (April 2009 issue)

does not have an execution date, once a date is set, he will have only 30 days to file his clemency application, so work on the case must begin immediately. Clemency proceedings may

begin as early as spring 2009. To learn how you can assist, please contact the Project at [deathpenaltyproject@staff.abanet.org](mailto:deathpenaltyproject@staff.abanet.org) or (202) 662-1738.

### Director's message, continued from page 1

In difficult economic times the need for pro bono legal assistance grows bigger, not smaller. State agencies and defender organizations have fewer resources and staff to represent indigent defendants and Death Row

prisoners. They need the help that only volunteer law firms can provide. Our continuing thanks to all our volunteers who are involved in this deeply rewarding and life-saving work.

Robin M. Maher, Director  
David Grossman, Staff Attorney  
Emily Williams, Staff Attorney  
Katie Hughes, Project Assistant  
Jenny Klein, Intern

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**Death Penalty in the News: U.S. Supreme Court Review**

**Cone v. Bell, No. 07-1114:**

Gary Cone was convicted of murder and sentenced to death in Tennessee. Mr. Cone claimed that mitigating evidence relating to his drug use was withheld during his trial. The Sixth Circuit Court of Appeals denied Mr. Cone's request to present the evidence based on the fact that the issue had been dismissed under Tennessee procedural law. The issue is whether federal courts may consider claims that were dismissed by state courts on procedural grounds. The case was argued on December 9, 2008.

**Harbison v. Bell, No. 07-8521:**

Edward Harbison was convicted of murder and sentenced to death after a

jury trial in Tennessee. The question before the Court is whether the Terrorist Death Penalty Enhancement Act of 2005 guarantees inmates federally funded counsel to pursue state clemency proceedings. The case was argued on January 12, 2009.

**District Attorney's Office v. Osborne, No. 08-06:**

In 1994, William Osborne was convicted of kidnapping, physical assault, and sexual assault and sentenced to 26 years in prison. Almost 10 years after the trial, Mr. Osborne filed suit in order to obtain DNA testing. The case is now pending before the Supreme Court, which will consider whether a state prisoner is entitled to post-conviction access to DNA evidence under the due

process clause. The case was argued on March 2, 2009.

**Bobby v. Bies, No. 08-598:**

Michael Bies was granted habeas relief by the Sixth Circuit Court of Appeals. He had been sentenced to death for a murder committed in 1992, despite evidence that he was mentally retarded. After the Court's decision in *Atkins v. Virginia* (2002), the Sixth Circuit held that the Double Jeopardy Clause precluded new litigation on Mr. Bies' mental state. Ohio petitioned the Supreme Court to reverse the Sixth Circuit's decision, arguing that Mr. Bies was found to be mentally retarded before the *Atkins* decision. The Supreme Court will hear arguments on April 27, 2009.

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